MOHD NOOR SIRAJAJUDEEN & ANOR A

v.

MAJLIS PERBANDARAN PULAU PINANG

HIGH COURT MALAYA, PULAU PINANG B
VARGHESE GEORGE J
[CIVIL SUIT NO: 21NCVC-03-07-2012]
17 MAY 2013

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Interlocutory injunction to prevent termination of bus terminal management agreement - Whether there were bona fide serious issues to be tried - Monetary compensation - Whether adequate remedy for applicant - Overriding public interest against granting injunction - Consideration of balance of harm or injustice - Applicant not able to satisfy undertaking as to damages if injunction granted - Public interest element outweighing applicant's interest - Whether interlocutory injunction refused* C D

CIVIL PROCEDURE: *Injunction - Erinford injunction - Principles and purpose of Erinford injunction - Whether damages adequate relief for applicant - Overriding public interest against granting of Erinford injunction - Whether application refused* E

CIVIL PROCEDURE: *Injunction - Interim injunction - Principles considered in deciding whether to grant interlocutory injunction*

The plaintiffs were partners in the firm known as 'Aspirasi Utara Engineering' ('the firm'). The firm was appointed as property manager of the defendant's express bus terminal at Sungai Nibong, Pulau Pinang. The firm's appointment was for a period of three years commencing on 16 October 2010 (with an option to renew for a further two years) and a principal term of the appointment was the payment by the firm of a monthly appointment fee of RM22,500 ('the fee'). The plaintiffs paid the fees from August 2011 to December 2011 but failed to pay the same for the months January 2012 to April 2012. The defendant on 4 May 2012 proceeded to issue a notice of termination. The plaintiffs filed this application for a prohibitory injunction to prohibit the defendant from taking over the management of the bus terminal and/or to appoint others to operate the bus terminal, until the action was disposed of. The plaintiffs contended that: (i) the notice was unlawful and invalid as the defendant had breached the agreement between the parties by not making available the bus terminal in suitable condition for the firm to manage or operate it as intended; (ii) the non-payment of the fee for the period January to April 2012 was justified as the defendant had failed to F G H I

implement the e-ticketing system; (iii) the firm had expended monies for renovations at the bus terminal; (iv) the termination was unfairly done and the firm stood to suffer financial loss or damages. The court had earlier granted interim prohibitory orders on an *ex parte* basis.

Held (dismissing plaintiffs' application with costs and ordering that the *ex parte* prohibitory orders granted earlier be dissolved):

(1) The approach to be taken by the court in exercising its discretionary powers whether or not to grant interlocutory injunctions had been succinctly set down by the Court of Appeal in the case of *Keet Gerald Francis Neol John v. Mohd Noor Abdullah & Ors*. (para 24)

(2) Applying the *Keet Gerald* guidelines and on an objective assessment of the assertions and contestations of the parties, there were several *bona fide* serious issues to be tried. In relation to whether the grant of the restraining orders would produce a just result for the period between the date of the plaintiff's application and the conclusion of the trial, the relevant factors to be considered in the circumstances of the factual matrix of this case, were (i) whether an award of monetary compensation or damages would be adequate remedy, in the event the plaintiff were to succeed at the close of trial; (ii) whether there was overriding public interest involved in the matter and what were the practical realities and demands surrounding the situation (the operations of the express bus terminal by a local authority); (iii) whether defendant would suffer greater harm or injustice if the restraining orders were allowed or whether plaintiff would suffer greater harm, if the restraining orders were not allowed; and (iv) the relative financial capacity/position as between the plaintiffs and the defendant and also plaintiffs' ability to meet the normal undertaking as to damages to be given if interlocutory restraining orders were to be made. (paras 25, 31 & 32)

(3) The defendant, as the local authority had the statutory duty to provide for suitable and well-managed bus terminals for the 'rakyat'. The plaintiff had not put into full operations the facilities at the bus terminal for the convenience of the travelling public despite the contract for the management of those facilities had been awarded to the firm as early as 7 September 2010. This was not a contractual dispute between private individuals *per se*. The public interest dimension to the issue could not be ignored. The situation was one where the public interest element or consideration outweighed the applicant's interest, in any event; *TNB v. Dolomite Industrial Park Sdn Bhd* (refd). (paras 38, 40 & 42)

(4) If weighed on the scale balance of harm (*ie* the comparative harm or injury which might arise from granting or withholding the injunction), the defendant would suffer greater harm and injustice in all the circumstances of this matter, if the injunction were granted. (para 43)

(5) Coupled with the factor that damages in monetary terms would be an adequate relief even if the plaintiff succeeded on their claim, together with the other considerations taken either collectively or separately, the balance of justice tilted in favour of the defendant against the granting of any restraining order as applied for by the plaintiff. (para 46)

(6) The plaintiffs had expressly held out that they were not able to meet the agreed 'monthly appointment fees' of RM22,500 and that they had appealed for a reduction of the same to a monthly sum of RM5,000. The plaintiffs also had adverted to certain changes being made to the firm's financial management to meet the firm's financial commitments. All that cast serious doubts as to the plaintiff's financial means and capacity. There was no evidence led to indicate that the plaintiffs or the firm would be in a position to meet their 'undertaking as to damages' should the outcome of the suit be ultimately against the plaintiffs. (paras 47 & 48)

(7) The public interest and defendant's public duty considerations had to be accorded recognition over and above all other consideration in the particular context of this case. In any event, damages in monetary terms would be an adequate relief in this case even if the plaintiffs were to succeed ultimately in their suit. Hence, the oral application for an *Erinford* Order pending disposal of the appeal to the Court of Appeal was dismissed. (paras 55 & 56)

Case(s) referred to:

Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd [2009] 2 CLJ 221 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdulah & 2 Ors [1995] 1 CLJ 293 CA ***(foll)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***

Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***

Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 CA ***(refd)***

For the plaintiffs - Gurubachan Singh; M/s Bachan & Kartar
For the defendant - Karin Lim (Dominic Pillai with her); M/s Presgrave & Matthews

Reported by Amutha Suppayah

A

JUDGMENT

Varghese George J:

Introduction

B **[1]** Enclosure 4 was an application by the plaintiffs for interlocutory restraining orders against the defendant pending final disposal of this suit, from essentially carrying into effect the defendant's notice of termination of 4 May 2012 issued with regard to the 'Property Management Agreement of Sungai Nibong Express Bus Terminal' C (14 November 2011) between the parties.

[2] On 24 July 2012 I had granted interim restraining orders on an *ex parte* basis pending *inter parte* disposal of encl. 4.

[3] On 28 December 2012 after I had considered all affidavit - D evidence and submissions of respective counsel, I dismissed encl. 4 of the plaintiffs and dissolved the interim injunctions earlier granted, which had been further extended by consent ad-interim order in the meanwhile. I also fixed early dates for disposal of the case.

[4] On the same day (28 December 2012), plaintiff's counsel orally E applied for an '*Erinford* Order'. (to sustain the interim *ex parte* orders) pending disposal of an intended appeal against my decision to the Court of Appeal.

[5] In the particular circumstances surrounding this case, I did not F consider it appropriate to grant any '*Erinford*' injunction orders and accordingly dismissed the said application.

Background

[6] The following, as I could make out, were the material facts that G formed the backdrop to this action, that is, shorn of the matters in dispute or controversy as between the parties.

[7] The plaintiffs were the partners in the firm known as 'Aspirasi Utara Engineering' ('the firm').

H **[8]** The defendant was the local government authority under the Local Government Act 1976 in respect of the whole area comprised within the island of Penang.

[9] Subsequent to a tender exercise and *vide* a letter of offer dated I 7 September 2010, the firm had been offered to be appointed as property manager of the defendant's Express Bus Terminal at Sungai Nibong, Pulau Pinang.

[10] The firm's appointment was for a period of three years commencing on 16 October 2010 (with an option to renew for a further two years thereafter) and a principal term of the appointment was the payment by the firm of an agreed monthly appointment fee of RM22,500.

[11] The firm took possession of the bus terminal on 1 November 2010. The formal 'property management agreement of Sungai Nibong Express Bus Terminal' was however only entered into by the parties on 14 November 2011.

[12] The plaintiffs only agreed to pay monthly appointment fees commencing from 1 August 2011 and did indeed proceed to pay the monthly appointment fees for the months of August 2011 to December 2011.

[13] On 12 December 2011 the parties entered into a 'supplementary agreement' specifically with regard to an intended implementation of an 'e-ticketing system' at the bus terminal by the firm. This however remained unimplemented as there arose uncertainties with regards to which of the two possible models of e-ticketing (the Pudu Sentral or Bandar Tasik Selatan systems) was to be put into operations at the bus terminal at Sungai Nibong.

[14] The plaintiffs/firm failed to pay the monthly appointment fees for the months January 2012 to April 2012. The defendant on 4 May 2012 proceeded to issue the notice of termination as referred to earlier.

[15] The material parts of the notice of termination are reproduced here:

> …
>
> 2. Dengan ini Notis diberi bahawa perlantikan tuan sebagai Pengurus Hartanah Terminal Bas Ekspres di Sungai Nibong ditamatkan pada 30 Jun 2012 dan tuan dikehendaki menyerahkan semua kutipan, buku, dokumen, akaun dan lain-lain lagi berhubung-kait dengan Pengursan Terminal Bas kepada Majlis.
>
> 3. Tanpa Prasangka kepada Notis ini dan hak-hak Majlis, saya diarah menuntut daripada anda, sebagaimana yang saya lakukan sekarang ini, bayaran sebanyak RM90,000 berupa fi perlantikan bagi tempoh dari Januari 2012 hingga April 2012 atas kadar RM22,500 sebulan.
>
> 4. …

Plaintiffs' Case In Summary

[16] The thrust of the plaintiffs' contention was that the defendant had been in prior breach of the terms of agreement between the parties and accordingly the defendant was not in a position to issue the notice of

termination. The purported notice was therefore unlawful and invalid. An issue cited was that the defendant had not made available the bus terminal in suitable condition for the firm to manage or operate it as intended.

[17] It was also claimed that the plaintiffs had complied with all terms of the property management agreement and the non payment of the monthly appointment fees for the period January to April 2012 was justified as the e-ticketing system was not in place for the terminal to be fully operational. It was contended that the failure to implement the e-ticketing system was attributable to the defendant's delay and the cancellation ultimately of the same by the defendant themselves.

[18] It was highlighted for the plaintiffs too that the firm had expended monies for renovations etc, at the bus terminal to get it operational and further the plaintiffs had pursuant to the terms of the property management agreement the exclusive rights to let-out/manage tenancies of shop-lots and other outlets at the bus terminal. The termination was therefore unfairly done and the firm stood to suffer financial loss or damages.

Defendant's Case In Summary

[19] The defendant maintained that in the event of the plaintiff's default in paying the appointment fees between January 2012 and April 2012 the defendant was entitled to issue the notice of termination. There was therefore a fundamental breach of the contract by the plaintiffs and the notice of termination issued was therefore validly done.

[20] The defendant also countered that all renovation required by the defendant *vis-a-vis* structural matters of the building (or capital improvements) had been duly complied with. Other repairs and renovations to make the building suitable were to be undertaken by the firm and the plaintiffs had failed to commence operations of the bus terminal; issues as to non-cooperation of bus operators and prevalence of touts were irrelevant and mere excuses of the firm.

[21] The defendant argued that the implementation of the e-ticketing system under the supplemental agreement was a separate and independent matters and should not be confused with the primary obligation of the plaintiffs under the 'property management agreement'.

[22] The defendant also laid emphasis on the fact that the plaintiffs had expressly admitted that the firm faced financial difficulties and had sought to reduce the amount of the monthly appointment fees from RM22,500 to RM5,000.

Assessment Of The Court

The Law

[23] This was an application for interlocutory restraining orders or prohibitory injunctions pending full trial of the suit. What was in effect being sought for by the plaintiffs (pending disposal of the case) in the particular context of this case was to prohibit the defendant from taking over the management of the bus terminal, a public facility provided by the defendant and/or to appoint some other to now manage or operate the facilities at the bus terminal until the action was disposed of.

[24] The approach to be taken by the court in exercising its discretionary powers whether or not to grant interlocutory injunctions had been succinctly set down by the Court of Appeal in the case of *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdulah & 2 Ors* [1995] 1 CLJ 293, where speaking through Gopal Sri Ram JCA (as His Lordships then was), it was stated as follows:

> To summarise, a Judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
>
> **first,** he must ask himself whether the **totality of the facts** presented before him **discloses a *bona fide* serious issue to be tried.** He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he **must refrain from making any determination on the merits of the claim or any defence to it.** It is sufficient if **he identifies with precision the issues raised** on the joinder and decides **whether these are serious enough to merit a trial.** If he finds, upon a consideration of all the relevant material before him, including submission of Counsel, that no **serious question is disclosed**, that is an end of the matter and the **relief is refused**. On the other hand if he does find **that there are serious questions to be tried**, he should **move on to the next step of his inquiry**;
>
> **second**, having found that an issue has been disclosed that requires further investigation, **he must consider where the justice of the case lies**. In making his assessment, he must **take into account** all relevant matters, including the **practical realities of the case** before him. He must weigh the *harm that the injunction would produce by its grant against the harm that would result from its refusal.* He is entitled to take into account, *inter alia*, the **relative financial standing of the litigants** before him. If after weighing all matters, he comes to the conclusion that the **plaintiff would suffer greater injustice if relief is withheld**, then he would be entitled to *grant the injunction especially if he is*

satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that **the defendant would suffer the greater injustice** by the grant of the injunction, he would be entitled to **refuse relief**. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the **plaintiff's ability to meet his undertaking in damages should the suit fail**, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

thirdly, the Judge must **have in the forefront of his mind that the remedy** that he is asked to administer *is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan (supra)*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to **take into account all discretionary consideration**, such as **delay in the making of the application or any adequate alternative remedy** that would satisfy plaintiff's equity, such *as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.* Any **question going to the public interest may**, and in appropriate cases should, **be taken into account**. A judge should briefly **set out in his judgment the several factors that weighed in his mind** when arriving at his conclusion.

Serious Issues To Be Tried

[25] Applying the *Keet Gerald* guidelines and on an objective assessment of the assertions and contestations of the parties in the matter as set out in their respective affidavits and submissions of counsel, I was of the view that there were several *bona fide* serious issues to be tried.

[26] At this stage, based on the decided authorities it was not for the court to embark upon a detailed assessment of the controversies between the parties or to make a determination on the merits of those serious issue or questions that have arisen on the affidavits or pleadings filed.

[27] In my assessment, included among the *bona fide* serious issues that required mature consideration in this suit were whether the default in payment by the plaintiff of the appointment fees for the period

January 2012 to April 2012 was by itself sufficient contractual ground for the defendant to terminate the property management agreement. In other words, was the notice of termination issued by defendant sustainable under the terms of the contract between the parties and/or in law in all the circumstances of the matter.

[28] Corollary to that or distinctly as an issue that the plaintiffs had to prove was whether the plaintiffs had any valid grounds or justification for withholding the payment of the appointment fees for the period January 2012 to April 2012. Related questions of fact that called for determination include why the firm had effected the monthly payments from August 2011 to December 2012 in the first place and whether the plaintiff had given prior notice of any intention of withholding such further payments due from January 2012 with reference to the 'matters' now being raised by the plaintiffs to justify non-payment.

[29] Related to the serious issues identified above in some manner but more significantly there was the further serious question that called for mature determination, namely, what were the rights and obligations of the respective parties:

(i) under the terms of the property management agreement,

(ii) under the terms of supplemental agreement,

and whether they were separate/distinct from each other or whether they were intertwined or interlinked.

[30] There were also other peripheral but nevertheless material issues, like, whether the defendant had sufficiently attended to the complaints raised by the plaintiffs as to structural aspects of the bus terminal building to make it suitable for its purpose. The defendant maintained that it had done so and on account of delay occasioned by such remedial works it was further claimed that the firm had indeed been granted waiver from payment of the monthly appointment fees from the time of the taking of possession of the building until July 2011.

Justice Of The Case

[31] Having concluded that there were *bona fide* serious issues to be tried, it remained for this court to embark on the next stage of enquiry, namely, whether the grant of the restraining orders would produce a just result for the period between the date of the plaintiff's application and the conclusion of the trial.

[32] Following the guidelines laid down in *Keet Gerald* the relevant factors to be considered in the circumstances of the factual matrix of this instant case, in my assessment could be particularised and summarised as follows:

(a) Whether an award of monetary compensation or damages would be adequate remedy, in the event the plaintiff were to succeed at the close of trial;

(b) Whether there was overriding public interest involved in the matter and what were the practical realities and demands surrounding the situation (the operations of the express bus terminal by a local authority).

(c) In considering the 'balance of harm' (injustice) question, whether defendant would suffer greater harm or injustice if the restraining orders are allowed or whether plaintiff would suffer greater harm, if the restraining orders are not allowed.

(d) The relative financial capacity/position as between the plaintiffs and the defendant and also plaintiffs' ability to meet the normal undertaking as to damages to be given if interlocutory restraining orders were to be made.

Monetary Damages Was Adequate Remedy If Plaintiff Ultimately Succeeded At The Trial Of This Matter

[33] It need to be emphasised here that this case centred around rights and obligations arising out of a contract. The contract itself was in respect of the management of a property for a period of three years (a periodic management contract). The terms of the contract did not grant or vest the plaintiff with rights in the nature of a 'proprietary interest 'or' beneficial interest' in the bus terminal *per se* or in the land it was constructed upon.

[34] It was not as if the dispute was related to a right in an immovable property where unless one party was restrained, there was the likely risk of the subject of the dispute being put beyond the reach of the other party, should the other party ultimately succeed in this suit.

[35] In my assessment also, any 'loss' or 'damages' incurred by the plaintiffs could be assessed and was most certainly, quantifiable and provable in monetary terms even if the plaintiffs were to succeed in convincing the court at trial that the defendant had breached the property management agreement.

[36] The terms of the property management agreement were also to a large extent akin to the terms of a normal periodic 'tenancy' agreement (perhaps in our case with attendant rights to sublet, shop lots, other outlets granted in advance). The Court of Appeal in *Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd* [2009] 2 CLJ 221 had occasion to observe (at p. 233) as follows:

> Damages Adequate Remedy
>
> [42] The instant appeal arose from a dispute pertaining to a tenancy agreement for the operation of a nightclub, the breach of which would at most give rise to quantifiable damages as an adequate and proper remedy. It is trite law that injunction would not be granted in such cases: see eg, *London & Blackwell Railway Co v. Cross* [1886] 3 Ch.D 354 per Lindley LJ, cited by Hashim Yeop A Sani CJ (M) (as he then was) in *Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 2 CLJ 157; [1990] 1 CLJ (Rep) 30 SC, and *Sivaperuman, (supra)*.

[37] Further the Court of Appeal in another case, *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122 also held as follows:

> [4] Section 29 of the Act does not prohibit the grant of temporary injunctions against the government. However, the merits of the present case did not justify the grant of the injunction sought. This was a case of a pure breach of contract. The appellant had no interest whatsoever in the immovable property in which the canteen was situated. All that the appellant had was a purely contractual right to run the canteen at the 1st respondent's premises, nothing more. If the appellant established a breach of contract at the trial of the action then it would be entitled to an award of damages in the ordinary way. Further, the appellant's complaints were readily compensated by a monetary award. Since monetary compensation was an adequate remedy, it followed that in accordance with well-settled principles governing equitable discretion, specific relief was inappropriate in the circumstances (pp. 134 f & 135 c-d).

[38] Overriding public interest and practical realities. The defendant in this case was the local authority for all the area within the island of Pulau Pinang and it was the defendant's statutory duty to provide for suitable and well managed bus terminals for the 'rakyat'. It was not disputed that the plaintiff had not put into full operations the facilities at the Sungai Nibong Bus Terminal (for express buses) for the convenience of the travelling public despite the contract for the management of those facilities had been awarded to the firm as early as 7 September 2010.

[39] Various extension for commencement of the operation had been granted by the defendant to the firm (the reasons wherefore were not material for the current purposes) and despite that, this facility for the benefit of the public at large remained not fully functional.

[40] This was not a contractual dispute between private individuals *per se*. The public interest dimension to the issue at hand could not be ignored. The practical realities on the ground, demanded that the defendant and the public should not be curtailed further from deriving the desired objectives of the bus terminal which had been erected with use of public funds.

[41] The Court of Appeal in its decision in *Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695 cited with approval Browne LJ's *dictum* or observation in *Smith v. Inner London Education Authority* [1978] 1 All ER 411 which was in the following terms:

> ... I think Counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom those duties are owed.

[42] Our instant case situation was definitely one where the public interest element or consideration outweighed the applicant's interest, in any event.

[43] Balance of harm - Put in another perspective, there was no cause for doubt in my mind that, if weighed on the scale 'balance of harm' (ie, the comparative harm or injury which may arise from granting or withholding the injunction), the defendant would suffer greater harm and injustice in all the circumstances of this matter, if the injunction were granted.

[44] The situation that would most likely unfold if the injunctions were granted as sought for would be:

(i) The plaintiff would continue to benefit from not having to pay the 'monthly appointment fee' until completion of trial, on the one hand.

(ii) On the other hand, the defendant and public would suffer from being deprived of the functional use the bus terminal.

(iii) Further, the defendant would be denied a source of income from 'rental' for the defendant's own property, which would have been the case otherwise.

[45] This would be totally 'unjust' to the defendant whose 'public' duty and obligations was a relevant factor that could not be excluded from being given a favourable consideration.

[46] Coupled with the factor that damages in monetary terms would be an adequate relief even if the plaintiff succeeded on their claim, I was of the view that based on the further considerations highlighted above, taken either collectively or separately, the balance of justice titled in favour of the defendant against the granting of any restraining order as applied for by the plaintiff.

Financial Capacity/Position Of The Parties

[47] If the above considerations were not enough to disallow the injunctions applied for by the plaintiffs, it was also not in dispute that the plaintiffs had expressly held out that they were not able to meet the agreed 'monthly appointment fees' of RM22,500 and that they had appealed for a reduction of the same to a monthly sum of RM5,000. (See exh. K (letter of 24 August 2011) in encl. 3). In related documents, the plaintiffs also had adverted to certain changes being made to the firm's financial management to meet the firm's financial commitments. All there cast serious doubts as to the plaintiff financial means and capacity.

[48] There was however no evidence led before the court on affidavit to show that the plaintiff was in sound financial standing with sufficient funds to meet its obligations under the property management agreement (monthly payments of the appointment fees, ongoing and recurrent maintenance, repairs costs that the plaintiffs had to bear), much less any evidence to indicate that the plaintiffs or the firm would be in a position to meet their 'undertaking as to damages' should the outcome of the suit be ultimately against the plaintiffs.

[49] The plaintiffs had been challenged by the defendant as to their financial standing and/or capacity to meet the 'undertaking as to damages' given, but the plaintiff had not on good or credible material, satisfied me on this score either.

[50] What could not be disregarded or discounted was also the further fact that the defendant was in a relatively financially stronger position as a statutory local authority while the plaintiffs were merely partners of 'partnership firm' (not even incorporated as a company with sufficient capital base or approved facilities).

A

Conclusion

[51] For the reasons elaborated and discussed above, I dismissed the plaintiffs' application in encl. 3 and ordered that the *ex parte* restraining orders granted earlier (extended by consent ad-interim orders in the meanwhile) be dissolved. I awarded defendants costs on the application.

B

Erinford Order

[52] Counsel for the plaintiff, upon an undertaking that he would be filing an appeal against my decision, immediately thereupon on 28 December 2012 applied for an '*Erinford* Order' pending disposal of the appeal at the Court of Appeal.

C

[53] His grounds were that:

(i) unless further restrained by such an 'Erinford Order', the outcome of the appeal would turn out to be nugatory or academic, as the subject matter of the 'contract' would likely be destroyed in the meanwhile, and

D

(ii) the plaintiffs were prepared to pay up all arrears and current monthly appointment fees due and outstanding.

E

[54] However, the said offer to pay was merely made from the bar table and there was nothing on evidence or any tender made of such sums outstanding, even on a without prejudice basis, if at all.

F

[55] To me, the public interest and defendant's public duty considerations, as highlighted above, had to be accorded recognition over and above all other consideration in the particular context of this case. I had as previously noted, also come to the conclusion that, in any event, damages in monetary terms would be an adequate relief in this case even if the plaintiffs were to succeed ultimately in their suit.

G

[56] I therefore dismissed the oral application for an *Erinford* Order pending disposal of the appeal to the Court of Appeal. I proceeded to fix this case for early trial.

H

I